IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-2

UNITED STATES OF AMERICA,
Appellant,

—v.—

TWELVE 200-FOOT REELS OF SUPER 8 MM. FILM, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 70-69

UNITED STATES OF AMERICA,
Appellant,

—v.—

GEORGE JOSEPH ORITO,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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INDEX

TABLE OF AUTHORITIES

Cases:

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Interest of *Amicus**

The American Civil Liberties Union is a nationwide non-partisan organization of over 160,000 members dedicated solely to preservation of the liberties safeguarded by the Bill of Rights. During its fifty-one year existence the ACLU has particularly been concerned with protecting the First Amendment guarantees of freedom of speech and press. While our original concern was with efforts to restrict political expression, we have long maintained that all forms of speech and writing, including "obscenity", are presumptively entitled to blanket constitutional protection.

These cases involve important questions concerning the constitutionally proper reach of two federal statutes regulating obscenity. Although this Court has upheld broad congressional power in this area, these statutes encompass prohibitions which are unrelated to legitimate governmental interests. It is our purpose to suggest that the Court identify and limit those goals which such legislation should pursue.

Introduction and Summary of Argument

These cases involve challenges to two federal statutes which respectively proscribe under any circumstances the importation of obscene materials, 19 U.S.C. Section 1305 and the transportation of such materials in interstate commerce by common carrier, 18 U.S.C. Section 1462. The

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* Letters of consent from the Government and from counsel for Appellee Orito to the filing of this brief have been filed with the Clerk. It is our understanding that efforts to communicate with the claimant-appellee in No. 70-2, Arial Paladini, who is appearing *pro se*, have been unsuccessful, and, accordingly that the Court has appointed Thomas Kuchel, Esq., as special *amicus curiae* in support of the judgment below.

analytical issue to be resolved is at which point on the continuum between the holding of *Stanley* v. *Georgia*, 394 U.S. 557 (1969), that the mere private possession and use of obscenity cannot be interdicted, and the more recent rulings in *United States* v. *Reidel*, 402 U.S. 351 (1971) and *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363 (1971), reaffirming that the commercial distribution of obscenity may continue to be proscribed, is the line of constitutional protection to be drawn.

The decision in *Stanley* v. *Georgia* contained the potential for redirecting this Court's obscenity doctrines away from an emphasis on the content of the expression and toward an analysis of the governmental interests advanced by the particular statutory arrangement. For the first time this Court held that an adult could possess and peruse obscenity in the privacy of his home without interference by the state. Based on this premise, various lower federal courts ruled that statutes which proscribed mere possession of obscenity under all circumstances were defective because they were not limited to pursuing those goals which *Stanley* suggested were valid. E.g., *Stein* v. *Batchelor*, 300 F. Supp. 602 (N.D. Tex. 1969, 3-judge court), *vacated on other grds.*, sub nom. *Dyson* v. *Stein*, 401 U.S. 200 (1971); *United States* v. *Various Articles of "Obscene" Merchandise*, 315 F. Supp. 191 (S.D.N.Y. 1970, 3-judge court), *prob. juris. noted*, 402 U.S. 971, *dism. per Rule 60*, 403 U.S. 942 (1971); *United States* v. *Dellapia*, 433 F.2d 1252 (2d Cir. 1970).

In *Reidel* and *Thirty-Seven Photographs* the Court dealt with federal obscenity statutes from the perspective at the opposite end of the mere possession/commercial distribution spectrum. In *Reidel*, the majority opinion, relying on *Roth* v. *United States*, 354 U.S. 476 (1957), upheld the gen-

eral validity of 18 U.S.C. Section 1461 as applied to commercial distributors who disseminate obscene matter through the mails. A plurality opinion in *Thirty-Seven Photographs* upheld the ban on importation of obscene materials as applied to items which the importer ultimately intended for public commercial distribution. While these two cases may have been correctly decided in light of their commercial contexts, their narrow reading of the principles of *Stanley* v. *Georgia* tends to inhibit a more traditional First Amendment analysis of obscenity legislation. Cf. *United States* v. *Various Articles of "Obscene" Merchandise, supra.*

In any event, the two statutes challenged here are susceptible of application in a variety of circumstances which are much more closely assimilated to the use and possession afforded protection by *Stanley* than to the commercial distribution model to which *Roth, Reidel* and *Thirty-Seven Photographs* pertain. For example, Section 1305 by its terms can be utilized to prevent an adult from legally purchasing a pornographic novel in Scandinavia and bringing it home in his suitcase, for its ultimate destination in his library. Similarly, Section 1462 theoretically prevents a person from taking an obscene book in his brief case on a business trip if he rides on a common carrier. Even if *Stanley* is read as a decision relying primarily on concepts of privacy, as the government contends, its protection does not cease at a man's front door, for the right of privacy "protects people, not places". *Katz* v. *United States,* 389 U.S. 347, 351 (1967). Rummaging a man's suitcase to inquire what literature satisfies his emotional needs is analytically no less intrusive of privacy than rifling his closets for the same purpose.

Since both statutes are capable of reaching a substantial range of conduct protected under the principles of *Stanley*, including the conduct of these appellees, they are defectively overbroad. With regard to Section 1305, the Court should announce a *per se* rule that it cannot validly be applied to essentially private importation of obscenity. See *United States* v. *Various Articles of "Obscene" Merchandise, supra;* Note, *The First Amendment Overbreadth Doctrine,* 83 Harv. L. Rev. 844 (1970). Deferring to a case-by-case adjudication of its validity will, in effect, mean that the statute's broad reach will go unchallenged. For similar reasons, Section 1462 should be invalidated as overbroad.

ARGUMENT

I.

The rationale of *Stanley* v. *Georgia* is applicable to the private use and possession of obscene material by adults in any setting.

The government's theory in these cases is that *Stanley* v. *Georgia* is a decision essentially, if not exclusively, vindicating the interests of privacy in the home. But *Stanley* was both argued and decided primarily as a First Amendment case. The language, analysis and conclusions of the opinion were premised on protecting freedom of thought. Stanley argued that a statute which "punishes mere private possession of obscene matter violates the First Amendment," and the Court agreed. 394 U.S. at 559. In reaching this conclusion, the Court distinguished most of its previous obscenity decisions as having dealt with "use of the mails to distribute objectionable material or with some form of public distribution or dissemination." *Id.* at 561.

But where possession of such material for private enjoyment is concerned, different interests are involved. The Court specifically rejected Georgia's contention that it could nevertheless "protect the individual's mind from the effects of obscenity," *id.* at 550, characterizing the assertion as a claimed right to thought control, offensive to the principles of the First Amendment.

To be sure, the intrusion into Stanley's home was a factor in the decision. But this element was "an added dimension" reinforcing, though not limiting, the "right to receive information and ideas, regardless of their social worth. . . ." *Id.* at 564. And if the First Amendment means that the government may not control men's minds by telling a person sitting alone in his own home what he may read, *id.* at 565, then it is difficult to understand what principled reasons would allow the same intrusion elsewhere. Even reading *Stanley* as essentially a privacy decision, the right of privacy has been held to protect "people, not places." *Katz* v. *United States*, 389 U.S. 347, 351 (1967); *Dellapia* v. *United States*, 433 F.2d 1252 (2d Cir. 1970). To limit the decision to the confines of one's home is to return to the doctrine of "constitutionally protected areas" abandoned in *Katz*. The businessman who takes an obscene book from his library, carries it in his brief case, reads it in his hotel room and thereafter returns it to his home should be protected from governmental intrusion throughout his journey; his First and Fourth Amendment interests do not significantly change throughout that time. The traveler returning from abroad with a similar book intended for his library should be entitled to the same protection. If these situations are not constitutionally protected, then as Mr. Justice Black noted, *Stanley* simply sustains a man "who "writes salacious books in his attic, prints them in his base-

ment, and reads them in his living room." *United States* v. *Thirty-Seven Photographs, supra* at 28 L. Ed.2d 837 (dissenting opinion).

That *Stanley* meant more than this was recognized by many of the lower federal court decisions which followed it. Based on *Stanley's* analysis of the kinds of interests which could sustain obscenity legislation, various courts invalidated legislative arrangements which by their reach impinged upon interests which *Stanley* had held to be protected. E.g., *Stein* v. *Batchelor*, 300 F. Supp. 602 (N.D. Tex. 1969, 3-judge court), *vacated on other grds.*, sub nom. *Dyson* v. *Stein*, 401 U.S. 200 (1971); *United States* v. *Various Articles of "Obscene" Merchandise*, 315 F. Supp. 191 (S.D. N.Y. 1970, 3-judge court), *prob. juris. noted*, 402 U.S. 971, *appeal dismissed per Rule 60*, 403 U.S. 942 (1971); *United States* v. *Dellapia*, 433 F.2d 1252 (2d Cir. 1970).

In *United States* v. *Dellapia* a prosecution was brought under 18 U.S.C. Section 1461 for the private mailing of obscene films. Viewing *Stanley* as having written "a new chapter" in obscenity analysis, the Second Circuit focused on the governmental interests being advanced by the particular prosecution. Since none of the interests subsumed within the concept of "public distribution" were infringed by the defendant's conduct, the reasoning of *Stanley* was controlling:

> The privacy that *Stanley* protects is the privacy of confidential communication or the privacy of being let alone if the communication does not harm others, not privacy in any other aspect. In *Stanley* the Court protected the "confidential communication" between a solitary viewer and a dirty movie or the right to be let alone with that movie—no matter how abhorrent the

> film may have been. * * * It would be anomalous to prevent consenting adults from freely passing among themselves obscene material which *Stanley* tells us each of them was entitled to possess and view or read. 433 F.2d at 1258.

Concluding that the defendant's conduct was protected, the Court construed the statute's "broad prohibition as subject to an underlying requirement that the mailing trespass upon a valid governmental interest which constitutionally justifies invasion of a private consensual relationship . . ." 433 F.2d at 1260.

Similarly, *United States* v. *Various Articles of "Obscene" Merchandise, supra* involved a challenge to the customs statute as applied to a person who sought to import single items for his own private use. Summing up the cases from *Roth* to *Stanley*, Circuit Judge Moore concluded that "orthodox First Amendment considerations are once again of paramount importance, *Roth* notwithstanding, even where the publications in issue are concededly obscene." 315 F. Supp. at 195. Finding no valid interests served by preventing the importer from receiving single copies of such publications, the court concluded that the broad prohibition of Section 1305 was unconstitutional as applied to importation for private use and enjoyment.

Such interpretations of *Stanley* are of continued vitality notwithstanding the Court's more recent decisions in *Reidel* and *Thirty-Seven Photographs*. Both of those decisions upheld the broad federal prohibition on mailing or importing obscene materials in the context of actual or intended commercial distribution. *Reidel* involved the application of Section 1461 to those who "are routinely disseminating ob-

scenity through the mails" and can make no claim about intrusions into the privacy of their home. 28 L. Ed.2d at 817. The majority opinion reasoned that Stanley's right to peruse obscene material in his home did not imply Reidel's right to sell it to him. *Thirty-Seven Photographs* involved application of Section 1305 to an importer who intended to incorporate those photographs into a book for commercial distribution. While a plurality of the Court felt that the statute could validly encompass private importation, the premises of the decision was the validity of a ban on importation in the commercial context. Neither of the two rulings is inconsistent with the reasoning and analysis in *Stanley* which are of continued relevance.[1]

II.

The statutes at issue are unconstitutional because they encompass a variety of situations and contexts where the possession of obscene materials is protected under the principles of *Stanley* v. *Georgia*.

Section 1305 contains a blanket prohibition on the importation of obscene material regardless of the context or the intended use. Section 1462 similarly proscribes the transportation of such materials by common carrier. These two statutes are capable of application in a variety of situations where the possession of obscene materials can be as-

[1] For example, in *United States* v. *Various Articles of "Obscene" Merchandise*, the court anticipated the majority view in *Thirty-Seven Photographs* by refusing to invalidate Section 1305 on its face and extending the decision "beyond the statute's application to the importation of obscene matter for purposes other than commercial dissemination" 315 F. Supp. at 197. Similarly, *Reidel* could have been decided the same way even under the kind of analysis of interests employed in *Stanley*. See, *The Supreme Court, 1970 Term*, 85 Harv. L. Rev. 3, 233, n. 30 (1971).

similated to the area of protection enunciated in *Stanley* v. *Georgia*, and accordingly are defectively overbroad.

A. *Section 1305*

The reach of the customs statute was best described by Justice Stewart,

> The terms of the statute appear to apply to an American tourist who, after exercising his constitutionally protected liberty to travel abroad, returns home with a single book in his charge, with no intention of selling it or otherwise using it. If the Government can constitutionally take the book away from him as he passes through customs, then I do not understand the meaning of *Stanley* v. *Georgia*. . . . *United States* v. *Thirty-Seven Photographs*, *supra*, 28 L.Ed.2d at 835 (concurring opinion).

The government does not raise a strenuous challenge to Justice Stewart's analysis, but instead offers various justifications for sustaining the statute in all of its applications.

First, the government argues that since individuals can be prevented from importing obscene materials by mail, even though intended for private use, then it would be "odd" to allow a right of importation for those who personally purchase obscene materials abroad. But we challenge the premise that *Thirty-Seven Photographs* and *Reidel* preclude a right of private importation by mail. When an adult in this country requests and receives an obscene book from a distributor abroad, the actual sale of the book does not offend state or federal law, and its receipt for private use is protected. Moreover, while there is no mechanism to interdict domestic mail to determine

whether it is obscene and whether the recipient wishes to receive it, the government does claim and exercise the right to examine mail matter from abroad and thus has the opportunity to make these inquiries to determine whether the importation infringes valid interests. Finally, even assuming that private importation by mail can be prohibited, it is still not "odd" at least to allow such importation when effected personally. If the traveler described by Justice Stewart is entitled to the protection of *Stanley's* principles, then that protection should not be withheld simply because the statute can validly be applied to other methods of private importation. In the First Amendment area, where precise tools are required and least drastic alternatives preferred, the odd phenomenon is an argument that a statute validly applicable to most situations should be held constitutional in all instances.

Second, the government contends that upholding a right of private importation would yield no measurable gain for the privacy of individuals.[2] But the power to regulate foreign commerce, like the power over the mails, cannot be utilized to enhance the government's substantive capacity to infringe on First Amendment interests. See *Lamont* v. *Postmaster General*, 381 U.S. 301, 305 (1965); *Hiett* v. *United States*, 415 F.2d 664 (5th Cir. 1969); *United States* v. *18 Packages of Magazines*, 238 F. Supp. 846, 848 (N.D. Cal. 1964). The fact that a returning traveler must surrender certain privacy and submit to a luggage search for

[2] The argument is partly based on an excessive assertion of the government's power to search at the border, see *United States* v. *Johnson*, 425 F.2d 630 (9th Cir. 1970), *cert. granted*, 400 U.S. 990, *dismissed per Rule 60*, 30 L. Ed.2d 35 (1971), and also premised on a continuing characterization of obscenity as though it were contraband, an attitude which cannot survive *Stanley's* holding.

smuggled diamonds or dutiable items does not justify the confiscation of an obscene book. The interests identified in *Stanley* protect against rummaging through a traveler's mind, not his luggage. The gravaman of the harm is telling a man he may not read or import the book because it may stimulate salacious thoughts. The damage is in surrendering the book, not submitting it for inspection intended to determine whether it contains narcotics or dirty pictures. The seizure of an obscene book is just as repugnant to constitutional values as the confiscation of Communist literature. Cf. *Lamont* v. *Postmaster General, supra.*

Third, the government resurrects an argument rejected in *Stanley,* namely, that it may prohibit importation of obscenity for private use in order to vindicate its interests in regulating public, commercial distribution. This Court was not concerned with the problem of "tracking" Mr. Stanley's film, and there should be no such concern here. There are narrower alternatives available to the government to accomplish valid goals. A variety of simple criteria and methods can be utilized to insure that the material is intended for the individual's own use. Customs officials can make a brief inquiry and solicit a response under oath.[3] The quantity of material could give rise to a presumption of commercial intent.[4] Finally, even if there is a small amount of fraudulently imported obscenity, it should be

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[3] Such a procedure would involve no added inconvenience to customs officials who now have to administer the seizure provisions. With regard to mail importations, customs officials now notify the addressee of the seizure and request assent to forfeiture. They would simply have to draft a new letter.

[4] In New York, like other states, one who possesses six or more identical or similar obscene articles is presumed to have an intent to sell them. N. Y. Penal Code, Section 235.10(2). See also, ALI Model Penal Code, Tent. Draft No. 6, Section 207.10(5).

remembered that a book or film which is admitted into this country (even those held not to be obscene) must nevertheless face an array of other federal and local barriers. Compare *United States* v. *A Motion Picture Film Entitled "I Am Curious-Yellow,"* 404 F.2d 196 (2d Cir. 1968) with *Karalexis* v. *Byrne*, 306 F. Supp. 1363 (D. Mass. 1969, 3-Judge court), *vacated on other grounds*, 401 U.S. 216 (1971) (involving the same film).

Finally, the substantial and, we submit, constitutionally required distinction between importation for private purposes and importation for commercial distribution is even reflected in a portion of the statute and in the administrative practice under it. Indeed, Section 1305 itself affords the Secretary discretion to admit the "so-called classics or books of recognized and established literary or scientific merit," when imported for *non-commercial purposes.* Though any such book would presumably never be found obscene because it possesses redeeming social value, nevertheless "the line between commercial and other importations extends a distinction to which the Congress was sensitive when it enacted Section 305". *United States* v. *Various Articles of "Obscene" Merchandise, supra* at 197. Similarly, even the Bureau of Customs recognized that "the passenger having in his luggage a single copy of a picture, book or magazine acquired abroad for his own use and not for resale, presents a special problem" and urged its inspectors to give such individuals "the benefit of any doubt in determining whether 'hard-core pornography' is involved". Bureau of Customs Circular, RES-15-PEN, January 15, 1964.

B. *Section 1462*

This statute contains defects of overbreadth similar to those found in the customs prohibition. It interdicts a wide variety of instances where an individual is in possession of obscene material under circumstances which entitle him to invoke the protection of *Stanley* v. *Georgia*. We do not wish to duplicate the analysis of this statute's overbreadth contained in appellee Orito's brief. We would, however, suggest that the proper principle for deciding these cases is as follows:

> . . . the protection granted to the possession of pornography in the home ought to be extended to all situations involving mere private possession by an adult. So long as the material is meant simply for private use of the individual and is not likely to be circulated, he retains a privacy interest regardless of his location and there seems to be no contrary state interests beyond those found insufficient in *Stanley*. *The Supreme Court, 1970 Term*, 85 Harv. L. Rev. 3, 236 (1971).

III.

The Court should declare now that these statutes are unconstitutionally overbroad.

We have argued that both statutes can be employed in a variety of instances where the possession of obscene material should be protected by the principle of *Stanley* v. *Georgia*, i.e., possession assimilated to personal use and enjoyment. If the Court agrees that these statutes are substantially overbroad, then two alternatives are available, either declare the statutes facially void or create a rule of First Amendment privilege based on the distinction between commercial and other uses of obscenity. Section 1305 is amenable to the latter approach, Section 1462 requires invalidation on its face.

In *Thirty-Seven Photographs*, the customs statute was upheld as applied to commercial importation. The issue here is importation for private, noncommercial use. But a variety of situations are encompassed within that concept. Whether or not the Court upholds the judgment below, other private importers will not know precisely what range of valid application the statute has in terms of quantity of materials, mail as opposed to personal importation, and the like.

Such uncertainty is particularly unfortunate with regard to Section 1305 whose primary effect is felt on individuals who seek to import isolated single copies of magazines or books for their own perusal.[8] First, there are severe venue

[8] For example, in the Southern District of New York the practice is to engage in "multiple seizures," i.e., dozens or hundreds of items intended for a similar number of separate importers are proceeded against in one complaint. In 1968, 2988 separate pack-

problems, since the statute mandates that forfeiture proceedings be brought in the district of the seizure, not where the addressee or importer resides. Second, there are cost burdens of traveling to that district and/or retaining counsel. Few private importers will be willing to assume these costs and burdens in order to litigate their right to a single book or magazine. Indeed, the entire system appears to be premised on the expectation that few will challenge the censor's decision. It is ironic that only those with a profit motive, i.e., the commercial importer, will have the interest in challenging the administrative determination for procedural or substantial defects, while those who claim constitutional protection under *Stanley* will be unable to vindicate their rights. Self-censorship will be the result.

Enunciating a broad rule excising private importation from the operation of the statute will avoid these uncertainties. The distinction between commercial and other activity with regard to obscenity is sensible, has a basis in the statute and its history, has been utilized in other First Amendment contexts and conforms to judicial policies which govern the operation of the overbreadth doctrine. See *United States* v. *Various Articles of "Obscene" Merchandise, supra,* 315 F. Supp. at 196-97; *United States* v. *New Orleans Bookmart,* 328 F. Supp. 136 (E.D. La. 1971); see generally, Note, *The First Amendment Overbreadth Doctrine, supra* at 921.

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ages belonging to approximately 2000 different claimants were subject to forfeiture actions. Only three of those persons filed an answer. See Cross-Jurisdictional Statement in *Various Articles of "Obscene" Merchandise* v. *United States,* O.T. 1970, No. 778, *app. dismissed,* 400 U.S. 935 (1970) at pp. 8-10. It is our understanding that recently there has been some increase in the number of private claimants who have filed letter-answers to the forfeiture proceedings.

The overbreadth considerations applicable to Section 1462 are somewhat different. It too is susceptible to a wide range of unconstitutional applications, as the appellee's brief in No. 70-69 indicates. By virtue of the "continuing offense" designation, there are venue burdens similar to those presented by Section 1305. See *Reed Enterprises* v. *Clark,* 278 F. Supp. 372 (D.C. D.C. 1967), *aff'd mem.,* 390 U.S. 457 (1968). Moreover, this statute does not readily lend itself to a distinction between commercial and other forms of transportation. Unlike Section 1305, it does not have an implicit sensitivity to such a distinction for certain purposes. Cf. *United States* v. *Various Articles of "Obscene" Merchandise, supra* at 196-97. Nor is there any background of administrative recognition of such differing interests. *Cf.* Bureau of Customs Circular, RES-15-PEN, *supra.* There is no administrative mechanism such as a customs inspection which affords the opportunity to draw the line. Finally, given the continued vitality of Section 1461, and the existence of state laws regulating obscenity, the potential harm from an interregnum statutory gap, should Section 1462 be invalidated, would be minimal.

CONCLUSION

For the reasons set forth above, the judgments should be affirmed.

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